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CHARTER COSTS AWARDS AND CIVIL DAMAGES AGAINST THE CROWN REPORT OF THE WORKING GROUP (2017)

Presented by
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Regina
Saskatchewan
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Presented at a joint session of the Civil and Criminal Sections

Charter Costs Awards and Civil Damages Against the Crown – Report of the Working Group (2017)

[1] At the 2015 ULCC meeting in Yellowknife, the Criminal Section adopted a resolution from Alberta to create a Working Group to study the impact of *R v Henry* on costs awards against the Crown. The Resolution was as follows:

> A working group should be formed to monitor the development of the case law surrounding the award of costs or damages against the Crown arising from criminal prosecutions. Civil section participation in the working group would be welcome.
>
> (Carried 14-0-0)

[2] At the 2016 ULCC meeting in Fredericton, an interim report prepared by Josh Hawkes was presented at the joint Civil and Criminal session. A copy of the report is enclosed at Annex 1. While there was no formal resolution, it was agreed that this joint Working Group should continue and would be coordinated through the Advisory Committee on Program Development and Management (ACPDM).

[3] The Working Group, chaired by Manon Lapointe of the Public Prosecution Service of Canada, included the following participants: Stephen Bindman (Justice Canada), Catherine Dumais (Director of Criminal and Penal Prosecutions of Quebec); Kathryn A. Gregory (Attorney General of New-Brunswick), Lori McMorran (Attorney General of British Columbia); Mary-Ellen Hurman and Sunil S. Mathai (Attorney General of Ontario) and W. Dean Sinclair (Attorney General of Saskatchewan).

[4] Members of the working group reviewed judgments which applied the principles adopted by the Supreme Court of Canada in *R v Henry*. They also discussed the recent Supreme Court of Canada cases in *Québec v Jodoin*, 2017 SCC 26 and *Ernst v Alberta Energy Regulator*, 2017 SCC 1. The decision in *Québec c Jodoin* reviewed the criteria applicable for the award of costs against lawyers personally. The case of *Ernst c Alberta Energy Regulator* dealt with the scope of immunity clauses in the context of the award of damages pursuant to s.24(1) of the *Canadian Charter*. Although these decisions do not deal, strictly speaking, with issues falling within the mandate of the working group, they are relevant to its work.

[5] The working group concluded that it was not required, at this stage, to update the report but considered that it would be useful to develop a chart of cases that have applied *R v Henry*. A copy of the chart is enclosed at Annex 2.

[6] The working group is proposing to continue to monitor, during the next year, the development of the case law on the award of costs or damages against the Crown arising from criminal prosecutions.

Annex 1 : Interim Report
Annex 2 : Chart of Post-*Henry* Cases

UNIFORM LAW CONFERENCE OF CANADA

CRIMINAL SECTION

CHARTER COSTS AWARDS AND CIVIL CHARTER DAMAGES AGAINST THE CROWN: AN INTERIM REPORT

Fredericton, New Brunswick
August 2016

Josh Hawkes, Q.C.

1. At the 2015 meeting of the Uniform Law Conference of Canada, Alberta introduced a resolution calling for a working group to monitor the development of the case law surrounding the award of costs or damages against the Crown arising from criminal prosecutions.[1] While the direct impetus behind the resolution was the decision of the Supreme Court of Canada in *Henry v BC*, the intent of the resolution was to capture the state of the law relating to both *Charter* costs awards in the criminal law context, and civil damages pursuant to section 24(1) of the *Charter* in that context.

2. This report provides an overview of the state of the law in both the criminal and civil context. We recognize that it is more than a little presumptuous for a Criminal Section working group to attempt to summarize the state of the civil law. The summary of this aspect of the law is, of necessity, very general. As noted in the resolution giving rise to the working group, it is hoped that this topic may be considered for a joint working group, where participation by the Civil Section would remedy that shortcoming.

Costs in Criminal Law

General Principles

3. The restrictive approach to costs in criminal prosecutions reaches back as far as Blackstone:

> *The King (and any person suing to his use) shall neither pay, nor receive costs; for . . . as it is his prerogative not to pay them to a subject, so it is beneath his dignity to receive them.*[2]

4. A more contemporary restatement of this principle is based on the unique role of the Crown as bringing litigation in the public interest, rather than on the basis of an individual grievance.[3] This principle was summarized by the Alberta Court of Appeal as follows:

> *While costs may be awarded against the Crown in the exercise of the Court's general jurisdiction, the clear rule has been that such costs will only be awarded where there has been serious misconduct on the part of the Crown. The reasons for limiting costs are that the Crown is not an ordinary litigant, does not win or lose criminal cases, and conducts prosecutions and makes decisions respecting prosecutions in the public interest. In the absence of proof of*

[1] Alberta-2015-01, available online at http://ulcc.ca/images/stories/2015_pdf_en/2015ulcc0002.pdf
[2] *Blackstone's Commentaries on the Laws of England*, 7th ed., Vol. III, p. 400, as cited in *Canadian Criminal Procedure*, R. E. Salhany, ch. 6.5020
[3] ***Berry v. British Transport Commission*** [1961] 3 All E.R. 65

misconduct, an award of costs against the Crown would be a harsh penalty for a Crown officer carrying out such public duties.[4]

Statutory Authority

5. The *Criminal Code* was initially similarly restrictive, providing only for costs against an accused upon conviction for treason or any indictable offense. Costs could also be awarded against a private prosecutor in an unsuccessful prosecution for defamatory libel. Amendments in 1955 remove the power to award costs against the accused, but the power to award costs in an unsuccessful prosecution for defamatory libel was retained.[5]

6. Modest statutory authority for the award of costs remains in the following five sections of the *Criminal Code*: [6]

    a. s. 601(5) (costs for amendment necessitated by a prejudicial variance, error or omission, in particulars),

    b. s. 751 (costs against the unsuccessful party in a prosecution for defamatory libel),

    c. s.803(4) (costs for dismissal of summary prosecution where prosecutor does not appear),

    d. s. 809(1) (costs against either party in a summary conviction proceeding)

    e. ss. 826-7, 834(1)(b), and 839(3)(costs in summary conviction appeal matters).

The Case Law

Jurisdiction to Award Costs

7. The jurisdiction of superior courts to award costs against the Crown as a manifestation of the inherent jurisdiction of those courts is well established. The

[4] ***R. v. Robinson*** 1999 ABCA 367 at para 29, see also ***R. v. Brown*** 2009 ONCA 633 at para's 16-9, ***R. v. Ciarnirllo*** 2006 CarswellOnt 5162 at para's 31-3 (On. CA), leave denied 2007 CarswellOnt 639 (SCC), ***R. v. A. K.*** 2016 NLCA 23 at para's 22-26 (NL. CA)
[5] *Canadian Criminal Procedure, supra,* at 6.5030
[6] These references do not include sections which permit the award of costs against the Attorney General in favor of third parties or others who have been the subject of search warrants or other investigative procedures. See for example ss. 462.32(6), 462.33(7). Other anomalous provisions, such as s.708(2) (regarding process service costs against an accused convicted of contempt), s. 714.7 (costs arising from the use of technology for remote appearance of witnesses) or the provisions addressing costs for the enforcement of sentencing related orders in ss. 734.6, s. 772(2) (costs associated with certain writs are not addressed.). Costs awards are specifically prohibited in the context of indictable appeals by virtue of section 683(3).

advent of the *Charter* and the availability of remedies pursuant to s.24(1) simply expanded the scope of that power.[7]

8. The jurisdiction of provincial or other statutory courts to award costs pursuant to the *Charter* is founded only on the jurisdiction to grant a *Charter* remedy. However, the ability of these courts to grant such a remedy in appropriate circumstances is well established.[8]

Threshold for Costs Awards

9. Although there are some areas of uncertainty around the periphery, the core elements of the circumstances that would justify an award of costs against the Crown require more than simple error or good faith disagreement as to disclosure or other obligations. The Alberta Court of Appeal described the threshold for costs as follows:

> *Costs should not be routinely awarded. Something more than a bona fide disagreement as to the applicable law, or a technical, unintended or innocent breach, whether clearly established or not, must be required. Otherwise, the criminal courts will be inundated with applications in this regard. We cannot ignore the fact that disclosure issues continue to occupy much of the Courts' time and attention in criminal trials, despite the existence of rules relating to disclosure, and often, good faith attempts on the part of police and Crown prosecutors to discharge their duties. Some degree of misconduct or an unacceptable degree of negligence must be present before costs are awarded against the Crown under s. 24(1) of the Charter.*[9]

10. This threshold was subsequently cited and clarified by the Supreme Court of Canada to require a "marked and unacceptable departure from the reasonable standards expected of the prosecution".[10] Although there have been slight variations in the language used to articulate this threshold, Appellate courts have uniformly upheld a stringent standard for costs awards against the Crown as a *Charter* remedy.[11]

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[7] ***R. v. Pawlowski*** 1993 Canlii3378 (On.CA), leave denied, September 23, 1993, ***Robinson***, *supra,* at para 29, ***Ontario v. 974649***, *supra,* at para 80
[8] See for example, ***Ontario v. 974649 Ltd.*** 2001 SCC 81 at para's 93-7, ***R. v. Pang*** 1994 ABCA 371
[9] ***Robinson***, *supra,* at para 30.
[10] ***Ontario v. 974649***, *supra,* at para 87
[11] See for example, ***R. v. Brown*** 2009 ONCA 633 at para's 16-20, ***R. v. Ciarnillo*** 2006 CarswellOnt 5162 (CA), leave denied 2007 CarswellOnt 639 at para's 34-6, ***R. v. Pidskalny*** 2012 SKCA 28 at para's 3-5

11. As noted above, superior courts can also award costs as a function of their inherent jurisdiction. The test for such awards is similarly restrictive. It is summarized in the following passage:

> *The inherent jurisdiction of the superior courts to award costs against the Crown in a criminal case is to be exercised only where there was serious misconduct on the part of the prosecution. Generally a criminal defendant is not entitled to costs unless there is something "remarkable" or "unique" about the case or something "oppressive" or "improper" about the conduct of the prosecution.*[12] *(Citations Omitted)*

12. This standard has been followed by appellate courts across the country.[13] Most recently the Ontario Court of Appeal affirmed that costs would not be a just an appropriate award for every established breach of the Crown's disclosure obligations. After a thorough review of the applicable case law, including a reference to *Henry v. BC* in the civil context, they summarized the threshold for costs as follows:

> *As the above-noted passage makes clear, inadvertent error is not enough to justify an award of costs for breach of the disclosure obligation and costs awards for such breaches will not be "routinely ordered in favour of accused persons who establish Charter violations": A costs award against the Crown will not be an "appropriate and just remedy" under s. 24(1) of the* Charter *absent a finding that the Crown's conduct demonstrated a "marked and unacceptable departure from the reasonable standards expected of the prosecution", or something that is "rare" or "unique" that "must at least result in something akin to an extreme hardship on the defendant". (Citations Omitted).*[14]

13. The case is also significant in affirming other factors that must be considered in determining if the non-disclosure by the Crown satisfies this threshold. These factors include:

    a. Whether the non-disclosure was inadvertent, the product of carelessness or negligence, or deliberate.[15]

    b. Defence inaction in the face of a known or evident disclosure error is also a significant factor.[16]

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[12] ***R. v. Bhatti*** 2006 BCCA 16 at para 11
[13] See for example ***R. v. Pawlowski***, *supra,* ***R. v. Griffin*** 2011 ABCA 197 at para's 25-32, ***R. v. Taylor*** 2008 NSCA 5 at para's 41-52, ***R. v. Tiffen*** 2008 ONCA 306 at para's 90-101, (appeal to the SCC Quashed),), ***R. v. A. K.*** 2016 NLCA 23 at para's 22-26 (NL. CA)
[14] ***R. v. Singh*** 2016 ONCA 108 at para 38
[15] ***Singh***, *supra*, at para 40,
[16] ***Singh***, *supra*, at para's 41-2, ***R. v. A.K.,*** *supra*, at para's 33-42 (NL.CA)

c. Findings that the non-disclosure resulted in extreme hardship require evidence. The mere fact that costs were incurred as a result of the non-disclosure and consequent mistrial is, in itself, insufficient to support such a finding.[17]

d. It is also a reversible error to base an award for costs against the Crown on the failings or misconduct of the police, a witness, or other party. An award against the Crown for such conduct is only available where they are a participant in that conduct.[18]

14. The Court also provided guidance on how the quantum of costs should be determined, notwithstanding the fact that these comments were not strictly necessary to resolve the issue at hand.[19] They summarized the following 5 principles:

a. Analogies to the civil rules much be approached with caution. Even where the criminal rules provide for such analogies to fill gaps, such provisions must not be interpreted as invitations to substitute the civil rules.[20]

b. The purpose of costs awards in criminal cases serve fundamentally different purposes. They are intended to discipline, discourage and deter flagrant and unjustified incidents of non-disclosure. They are not intended to indemnify the accused, although they may have that effect.[21]

c. The role of the Crown is fundamentally different than that of a private litigant in civil proceedings. The public nature of the duties of the Crown have a moderating effect on costs awards against the Crown.[22]

d. The fact that costs awards in this context are not against the "losing" party, but rather come from public funds. The fact that the award comes from public funds also has implications both on the quantum, and must be made with due regard for the role of governments in allocating those funds. Six factors were summarized in adjusting a costs award to consider the public source of the funds.[23]

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[17] ***Singh***, *supra*, at para 44
[18] ***Singh***, *supra*, at para 45.
[19] ***Singh,*** *supra*, at para 46
[20] ***Singh***, *supra*, at para's 49-50, see also ***R. v. Wetzel*** 2013 SKCA 143 at para's 2, 55-6.
[21] ***Singh***, *supra*, at para's 53-5
[22] ***Singh***, *supra*, at para 54-5
[23] ***Singh***, *supra*, at para 57

e. The Court provided specific guidance with respect to how the issue of Legal Aid should be considered and addressed. The Court concluded that revealing whether a defendant has Legal Aid does not constitute a breach of privilege.[24] Second, they concluded that the fact that a defendant was covered by Legal Aid is an important factor in determining both whether a defendant has suffered financial hardship and what the quantum of costs should be.[25]

Examples of Costs Awards

15. There are several examples of costs awards arising from *Charter* breaches. Many of these cases arise from disclosure breaches or issues.[26] Other examples include where the rights of third parties may have been violated through search warrants or production orders, or proceedings delayed because of a lack of capacity to obtain timely forensic reports.[27]

16. The Ontario Court of Appeal recently upheld a significant cost award against the Crown in the context of a forfeiture application under the *Controlled Drugs and Substances Act* against third party respondents. While noting the absence of a *Charter* breach, the Court characterized the conduct of the Crown as failing to consider the evidence available at the outset of the application, pursuing a "hopeless", "completely meritless application", and taking an unjustifiably hard line with all three respondents.[28] This conduct, over a protracted period of time, against third parties who were never charged was characterized as a marked and unacceptable departure from reasonable conduct. The Court upheld an award approaching one million dollars.[29]

17. Delay in bail hearings characterized as inordinate, inappropriate, and the product of systemic factors may also result in costs awards against the Crown.[30]

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[24] ***Singh***, *supra*, at para's 59-63
[25] ***Singh***, *supra*, at para's 64-8
[26] See for example ***Ontario v. 974649***, *supra*, at para's 1-4, 7, ***R. v. Cameron*** 2006 CarswellOnt 2987 at para's 9-19, ***R. v. Sweeney*** 2003 MBCA 127 at para's 44-56, ***R. v. S.E.L.*** 2013 ABCA 45 at para's 1-6, 29
[27] ***R. v. Ciarnillo,*** *supra*, at para's 37-44,
[28] ***R. v. Fercan Developments Ltd.,*** 2016 ONCA 269 at para's 96-113, 125-9
[29] ***Fercan***, *supra*, at para's 1-2, 146-7
[30] ***R. v. Brown*** 2009 ONCA 633, at para's 18-27, ***R. v. Zarinchang*** 2010 ONCA 286 (Ont. CA) at para's 68-73

Charter Damages as a Civil Remedy

18. As noted at the outset of this paper, this working group arose from a resolution passed in the Criminal Section of the Uniform Law Conference of Canada. It was contemplated that after the initial report of the group, the Civil Section of the Conference would be contacted to determine if there was an interest in that section participating in this work.

19. As a result, the observations of the working group on the award of civil damages against the Crown as a *Charter* remedy are tentative observations regarding the development of the law in this area. The impetus for the resolution arose from the decision of the Supreme Court of Canada in *Henry v. British Columbia*, and the revised test articulated by the Court for damages arising from intentional non-disclosure.

20. The Criminal Section was interested in both the direct impact and evolution of this decision on damages against the Crown. Obviously, the civil law ramifications of this decision would need to be assessed by those with expertise in that area.

21. The following brief overview might therefore be better thought of as an introduction to this area of the law, and an invitation, to the Civil Section to provide the needed perspective and expertise to more appropriately analyze this area of the law.

22. Charter damages as opposed to costs against the Crown may be awarded as a remedy pursuant to s. 24(1) in the course of a civil action where the following criteria have been met:

    a. A *Charter* breach must be established in the context of a civil action.[31] It should be noted that these actions for "public law damages" are distinct from other claims. The state is collectively liable for the breaches, rather than individual state actors.[32]

    b. Damages must be functionally appropriate. That is, they must further the objectives of the *Charter* either through the objectives of compensation, vindication, or deterrence.[33]

    c. Countervailing factors must be considered. In this unique context of constitutional damages against the state, once a claimant has established the "basic functionality" of *Charter* damages the burden then shifts to the

[31] ***Ward v. Vancouver*** 2010 SCC 27 at para's 4, 23
[32] ***Ward***, *supra,* at para 22, ***Henry v. British Columbia*** 2015 SCC 24 at para 80
[33] ***Ward***, *supra,* at para's 25-31

Crown to establish that other available remedies (for example, a concurrent tort action, or the availability of another effective remedy such as a declaration) would be adequate in the circumstances.[34] A further countervailing factor is whether the award would give rise to "good governance concerns", either because a minimum level of gravity has not been established, or because the award of damages would impinge on functions that only the state can perform. Such functions include policy making, or the proper enforcement of a law that was valid at the time of the impugned state action. The list of governance factors is not closed.[35]

In *Henry*, the court again considered the context of "good governance" factors in the particular context of disclosure. The court acknowledged the validity of the concern over prosecutors routinely entangled in civil suits and "defensive litigation" by prosecutors. Such litigation would not only deflect prosecutors from their proper public purpose, but result in conduct of criminal prosecutions with inordinate emphasis on the civil liability consequences that they or their governments might face.[36] These concerns necessitated the establishment of a higher threshold for damages in this context that will be described below.

At this time it is not clear whether this higher threshold will effectively address these good governance concerns. For example, the majority noted that the effect of a court ruling on disclosure, even if erroneous, would insulate the Crown from a civil damages claim for non-disclosure.[37] That may prompt a prosecutor to seek such a ruling even where the material in question would not appear to fall within the scope of the constitutional obligation to disclose. As described below, such caution may be warranted, particularly where the impugned decisions are based on actual or imputed knowledge of materiality or relevance or that the prosecution ought to have obtained the information in question.[38] Determination of such factors is context sensitive, and may change as a prosecution progresses.[39] Disclosure decisions are also impacted by many other factors, many of which are not within the direct control or knowledge of the prosecuting Crown.[40]

d. The quantum of damages must be determined. Determinations of quantum will involve consideration of both pecuniary and non-pecuniary

[34] ***Ward,*** *supra*, at para's 33-8
[35] ***Ward***, *supra*, at para's 39-45
[36] ***Henry***, *supra*, at para's 40-41, 70-81
[37] ***Henry***, *supra*, at para 90
[38] ***Henry***, *supra*, at para's 84, 86
[39] ***Henry***, *supra*, at para's 60-61
[40] ***Henry***, *supra*, at para's 92-3

losses, the seriousness of the state conduct and corresponding breach, and the impact of a large award diverting funds for public programs or benefits to a single individual.[41]

23. In the context of non-disclosure the Supreme Court effectively established a new basis for constitutional damages against the Crown where the following elements relating to non-disclosure have been established:

    a. The Crown must intentionally withhold or fail to obtain and disclose relevant and material information.

    b. That the Crown knew or would reasonably be expected to know that withholding or not obtaining the information would likely impair the right to make full answer and defence.[42] The usual principles for establishing intent, including the inference that natural and probable consequences are intended apply. As a result, the evidentiary burden is not high.[43]

    c. That the failure to disclose resulted in a breach of the right to make full answer and defence. This would exclude technical or minor failures to disclose that do not impair the right to full answer and defence.[44] Even where a violation of the right to make full answer and defence has been established, not all violations warrant an award of *Charter* damages as a remedy.[45] In this regard, it appears that the majority may be attempting to mirror some aspects of the standard for costs described earlier – not every technical fault or good faith error may give rise to a claim for costs or damages.

    d. That the breach of the right to full answer and defence caused legally recognized harm. Wrongful conviction or incarceration arising from non-disclosure clearly and easily satisfies this threshold. The resulting damage awards would be very large.[46] Similarly, if the failure to disclose delayed the resolution or withdrawal of the case, that period of delay may arguably give rise to compensable damages.[47]

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[41] ***Ward***, *supra*, at para's 46-57
[42] ***Henry***, *supra*, at para 31, 82-84
[43] ***Henry***, *supra*, at para's 84-86
[44] ***Henry***, *supra*, at para 70. See for example ***R. v. Dixon*** [1998] 1 SCR 244 at para's 29-34, 41-56
[45] ***Henry***, *supra*, at para's 68-9
[46] ***Henry***, *supra*, at para's 95-8
[47] *Henry*, *supra*, at para 96, ***Phillion v. Ontario*** 2014 ONCA 567 at para's 1-9, 36-9, leave denied at 2015 Canlii 7332

24. The Court expressly noted that other "good governance" arguments could be raised by the Crown on a case by case basis.[48] They also noted that this new test was expressly restricted to cases of non-disclosure.[49] The contextual factors that may apply with respect to any other breach will involve different considerations that will need to be resolved in other cases.

25. Subsequent cases shed some light on the interpretation and application of these factors. The most obvious of these is the trial decision in ***Henry*** itself, released in June 2016.[50] That case illustrates the high threshold of misconduct required to sustain a claim for damages, as well as the magnitude of those damages where that misconduct results in wrongful conviction and incarceration.

26. The trial judge made several key findings of fact in ultimately awarding total damages under several different headings totaling just over $8 million dollars.[51] The key findings are summarized as follows:

> *473 In summary, I make the following findings:*
>
> *a) Mr. Henry's allegation that Crown Counsel breached his Charter rights by applying to dismiss his conviction and sentence appeals for want of prosecution at too early a stage without properly advising the Court of Appeal of certain matters is dismissed.*
>
> *b) However, Crown Counsel failed in its duty of disclosure to Mr. Henry by intentionally withholding from him relevant information that the Crown had in its possession prior to his 1983 trial.*
>
> *c) Crown Counsel withheld this information despite repeated requests by Mr. Henry and his counsel for full disclosure.*
>
> *d) Crown Counsel knew or ought reasonably to have known that the information it intentionally withheld from Mr. Henry was material to the defence, and that the failure to disclose it would likely impinge on Mr. Henry's ability to make full answer and defence. Much of the evidence that the Crown wrongfully withheld was damaging to its case against Mr. Henry.*
>
> *e) Crown Counsel's decisions to withhold material information from Mr. Henry were not validated by judicial imprimatur.*

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[48] ***Henry***, *supra*, at para 83
[49] ***Henry***, *supra*, at para 33
[50] ***Henry v. British Columbia*** 2016 CarswellBC 1543, 2016 BCSC 1038 (Canlii), hereafter referred to as ***Henry (Trial)***
[51] ***Henry (Trial),*** *supra*, at para 474

f) Crown Counsel's wrongful non-disclosure seriously infringed Mr. Henry's right to a fair trial, and demonstrates a shocking disregard for his rights under ss. 7 and 11(d) of the Charter.

g) If Mr. Henry had received the disclosure to which he was entitled, the likely result would have been his acquittal at his 1983 trial, and certainly the avoidance of his sentencing as dangerous offender. The Province is therefore liable for Mr. Henry's wrongful conviction and subsequent lengthy period of incarceration.

h) Mr. Henry is not responsible in whole or in part for his losses on the basis of contributory negligence or failure to mitigate.

i) Crown Counsel's failure to disclose the information to which Mr. Henry was entitled negates any fault on the part of the VPD for any failings that might be attributed to them in their investigation of the offences at issue and in their treatment of Mr. Henry.

j) The Province has not discharged its burden of establishing fault on the part of the Federal Crown. The evidence before me falls short of establishing that the Federal Crown failed to conduct a meaningful review of Mr. Henry's applications for mercy or that the Federal Crown behaved recklessly or in bad faith.

27. The conclusion that judicial rulings regarding disclosure made during the proceedings against Henry did not inoculate the Crown against subsequent claims for damages as might otherwise be the case is significant. The court concluded that the trial prosecutor misled the trial judge regarding further requests made by Henry for disclosure, and about the nature of the evidence known to or in the possession of the Crown at the time of those applications. As a result, the rulings of the trial judge regarding disclosure during the course of the proceedings against Henry did not shield the Crown.[52]

28. The trial judge came to several conclusions regarding the quantum of damages that are significant, including a confirmation that the *Guidelines for Compensation of the Wrongfully Convicted* are not binding where the issue of breach and compensation is litigated. Further, he determined that notwithstanding the fact that it was the actions of subsequent prosecutors to re-open the Henry case and set aside the conviction, that appropriate action did not offset the significant Crown misconduct that resulted in lengthy incarceration. *Charter*

[52] ***Henry (Trial)***, *supra*, at para's 240-46

damages remained an appropriate response to the shocking conduct that resulted in 27 years of wrongful incarceration.[53]

29. The Manitoba Court of Appeal decision in ***Hyra v. Manitoba*** is also of interest.[54] Hyra had been convicted of criminal harassment. Both his conviction appeal, and subsequent application for ministerial review of his conviction were dismissed.[55] He filed a Statement of Claim against the individual prosecutor, and the Crown for negligence and for breach of his *Charter* disclosure rights. The non-disclosed information was known to him and to his trial counsel through other sources, but was never requested by his counsel at any stage of the proceedings against him. Further, the Statement of Claim did not allege that he objected to the non-disclosure during his trial or appeal of the criminal conviction.[56]

30. The Manitoba Court of Appeal affirmed the decision striking his Statement of Claim. They reiterated that ***Henry*** does not permit an action against the Crown for negligence, but creates a specific cause of action for non-disclosure with discrete requirements, none of which were satisfied by the pleadings in this case.[57] The Court also concluded that the conduct of trial counsel in the criminal case in failing to request the disclosure was significant. It demonstrated both a failure to request disclosure and to make an objection where disclosure is not provided. It also supported an inference that the failure to take any steps despite knowledge of the non-disclosed information supported a conclusion that the information was not relevant to the criminal proceeding.[58]

31. Several additional factors remain to be determined through subsequent litigation. These include:

a. the applicable test and availability of *Charter* damages to the actions of other state actors and regulators,

b. the effectiveness of the test articulated in ***Henry*** in striking the balance between providing an effective and flexible remedy and the "good governance" concerns identified by the Court,

c. whether the increased emphasis on the availability of constitutional damages will shift litigation from the higher threshold required for malicious prosecution to lower thresholds applicable to disclosure and potentially other *Charter* breaches?

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[53] ***Henry (Trial)***, *supra*, at para's 370-373
[54] ***Hyra v. Manitoba*** 2015 MBCA 55
[55] ***Hyra***, *supra*, at para's 5-6
[56] ***Hyra***, *supra*, at para's 9-12
[57] ***Hyra***, *supra*, at para's 35-9
[58] ***Hyra***, *supra*, at para's 40-46

Conclusion

32. The working group recommends that the law with respect to costs and civil *Charter* damages continue to be monitored for these and other developments. Further, the group recommends that the Civil Section be formally invited to participate in this ongoing work.

Annex 2 - Chart of Post-*Henry* Cases

Case	Facts	Violation(s)	Damages
Duperré c Durette, 2016 QCCS 1653	In 2004, the plaintiff, a lawyer, was charged with a five-count information pursuant to the *Bankruptcy and Insolvency Act*. He was discharged at the conclusion of the preliminary inquiry in 2006. The plaintiff filed a civil suit alleging a violation of his constitutional rights.	Police officers deliberately withheld continuation reports and did not inform the Crown prosecutor of their existence. The reports were not disclosed to the defence.	The Court rejected the claim. The claimant failed to establish that the information which was not disclosed was material to the defence and that the failure to disclose had undermined the accused's ability to make full answer and defence or caused a prejudice.
Henry v. British Columbia, 2016 BCSC 1038	Application of the SCC decision in *Henry*	Crown Counsel's wrongful non-disclosure seriously infringed Mr. Henry's right to a fair trial, and demonstrates a shocking disregard for his rights under ss. 7 and 11 (d) of the *Charter*.	An award of damages under s. 24(1) of the *Charter* is a just and appropriate remedy in this case. The court concluded that Mr. Henry was entitled to compensatory damages in the amount of $530,000 under s. 24(1) of the Charter, special damages in the amount of $56,691.80 (unrelated to the *Charter* violation); and damages in the amount of $7,500,000 to serve both the vindication and deterrence functions of s. 24(1) of the *Charter* for a total of $8,086,691.80. The trial court refused to impart liability on the federal crown, for its role in the review of the case, and the police, for its investigation. On this point, it concluded that Crown Counsel's failure to disclose the information to which Mr. Henry was entitled negates any fault on the part of the Vancouver Police Department for any failings that might be attributed to them in their investigation

Annex 2 - Chart of Post-*Henry* Cases

Case	Facts	Violation(s)	Damages
			of the offences at issue and in their treatment of Mr. Henry. The court refused to non-pecuniary damages in light of the award of damages to vindicate Mr. Henry's breached *Charter* rights.
Hyra v Manitoba et al., 2015 MBCA 55	The appellant was convicted of criminal harassment and his appeal was dismissed. The appellant unsuccessfully pursued an application for a ministerial review of his conviction pursuant to s. 696.1 of the *Criminal Code*. The appellant commenced an action alleging, among other things, negligence on the part of the prosecutor and the prosecution service as well as violations of the *Charter*.	The underlying theme of the action was that, during criminal proceedings, the Crown prosecutor breached the plaintiff's right to disclosure regarding certain information held by the Winnipeg Police Service (WPS) and the Crown. The information held by the Crown related to their file regarding the appellant on another criminal harassment allegation involving the same complainant with which the Crown did not proceed.	Interesting review of the *Henry* principles. The appeal was dismissed because the claim did not meet the criteria established by *Henry*. The appellant was aware of the information in the possession of the WPS and the Crown, the information was never requested to be disclosed either prior to the criminal trial or the appeal.

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	The totality of his claim was struck by the master and, on appeal, by the motion judge. The plaintiff appealed.		
MacRae v Feeney, 2016 ABCA 343	The appellant was charged for an assault against his ex-wife. Moreover, he had made a complaint against the police for its handling of a separate file involving his ex-wife and her sister.	The appellant sued the police for negligent investigation and for infringing his *Charter* rights (to be free from arbitrary detention and the right to equal protection without discrimination on the basis of sex).	The judge dismissed the claim. The court rejected the claim based on the *Charter* violations because Mr. MacRae had failed to proffer evidence of bad faith. On appeal, Mr. McRae argued that the SCC decision in *Henry* was authority for the proposition that claims such as his do not require proof of bad faith. The Court of appeal rejected that argument: "The judgment of the Supreme Court in *Henry v. British Columbia* is not as far reaching an authority as Mr. MacRae maintains. In fact, the Court took great pains to emphasize that its pronouncement that "malice" does not offer a useful liability threshold is confined to claims of wrongful non-disclosure by prosecutors." (para. 11) The appeal was dismissed.
Payne v Mak, 2017 ONSC 243	The plaintiffs were charged with arson by negligence pursuant to s.436 of the *Criminal Code*. The charges were ultimately stayed or dismissed.	The plaintiffs alleged violation of s. 7 of the *Charter* as a result of proceeding with charges without reasonable and probable grounds and for arbitrary state action based on a law that is vague.	The plaintiffs argued that there was no need to establish an absence of malice following the decision in *Henry*. The argument was rejected. "In my view, the plaintiffs are attempting to advance a malicious prosecution claim in the guise of a s.24 *Charter* claim, in an effort to get around the clear requirement that malice be proven." (para. 91)
R v Fercan Developments	The Crown made an application to	The Crown abandoned its application against one of the respondents after 31 days of	The application judge held that costs are appropriate where there has been a "marked and unacceptable departure from the reasonable standards expected of the prosecution."

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Inc., 2016 ONCA 269	forfeit two properties under s.16 of the *CDSA*. After hearing an application for costs brought by all three respondents, the application judge ordered costs of almost $1 million against the Crown.	evidence. After 36 days of evidence, multiple motions, and comprehensive written and oral submissions, the application judge dismissed the Crown's application to forfeit against the two other respondents. The application judge found that the evidence overwhelmingly led to the conclusion that the other two respondents were innocent of any complicity or collusion in relation to the designated-substance offences committed at the properties.	The Crown argued on appeal that the test applied was only appropriate when awarding costs against the Crown under s. 24(1) of the *Charter* only. The correct standard to apply is narrower and consists in a conduct that is reprehensible, a serious affront to the authority of the court, or serious interference with the administration of justice. The argument was rejected by the Court of appeal of Ontario.
R v Guindon, 2016 ONSC 1140	Mr. Guindon was charged with drug related offences. The Crown stayed the charges.	The applicant sought costs against the Crown pursuant to section 24(1) of the *Charter* as a result of alleged material non-disclosure. The document sought, a report from a police officer referenced in an affidavit, was ultimately provided to the defence.	Is delay in disclosing a document sufficient in and of itself to justify an award of costs against the Crown? "[36] While she (Ms. Weiler, the crown prosecutor) can be expected to have carefully reviewed the affidavit for the purpose of editing it, this does not mean that she memorized its contents. It is quite possible that several months after editing the Reliant affidavit Ms. Weiler had no independent recollection of the brief reference in it to Constable Ebdon's report. Crown counsel normally have carriage of more than one case at a time. As a senior prosecutor, Ms. Weiler likely had a significant workload that extended beyond Project Kingfisher. This is not to suggest that a busy Crown can be less than diligent in fulfilling his or her duties on each case they have responsibility for. Rather, it is a recognition of the reality that absent a photographic memory, a Crown cannot be expected to recall every detail about a document months after reviewing it. There is no evidence that Ms. Weiler had a specific recollection of the reference to Constable Ebdon's report in the Reliant affidavit and deliberately decided not to disclose it. [37] At the highest, the Crown made an error in judgment by not appreciating the potential relevance

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			of Constable Ebdon's report to a section 8 application. This falls at the very low end of the spectrum, described by the court in *Singh* as being an error in judgment about the relevance of certain tangential information. It is far less serious than the omission in *Singh*, which involved a failure to disclosure clearly relevant cellular phone records that the Crown knew were in existence. Consequently, the failure of the Crown to disclose Constable Ebdon's report prior to June of 2015 does not approach the level of misconduct necessary to justify an order for costs." The motion to dismiss the application for costs was granted.
R v Singh, 2016 ONCA 108	The respondents were charged with kidnapping, extortion and assault.	About a month into the trial, the Crown realized it had not disclosed important inculpatory evidence (cell phone records).	The trial judge declared a mistrial and ordered the Crown to pay $580,086.61. The Court of Appeal concluded that the trial judge erred in awarding costs against the Crown (para. 39 ss). The Court of Appeal notes that there was no suggestion of an intentional failure to provide disclosure in a timely fashion. The trial judge expressly found there was no evidence of deliberate misconduct on the part of the Crown. This was not a case where the conduct of the prosecutor was a flagrant or marked departure from the norm. The failure to disclose the evidence was inadvertent and had not been pursued by counsel. Interesting discussion about the import of the civil cost regime into the criminal context (para. 48).
Whaling v Canada (Attorney General), 2017 FC 121	The plaintiffs brought their respective claims in the form of proposed class actions. The proposed classes of claimants are those federal inmates whose rights to accelerated parole	The plaintiffs claim alleges a breach of s.11 (h) of the *Charter*	The ruling deals with the need for adequate pleadings to support a claim for damages. "The plaintiffs pleaded that the respondents' conduct was "clearly wrong, in bad faith or an abuse of power" – one of the elements typically required in order to found a damages claim under section 24(1) of the Charter – but failed to supply material facts on the question of how the *Regulations* and their enforcement constitute serious error, bad faith or abuse so as to trigger an entitlement to Charter damages. They also fail to give any particulars of any conduct that would support a damages claim." (para. 29) The motion to strike was granted.

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	review were removed retrospectively by the coming into force of the *Abolition of Early Parole Act*. The defendant filed a motion to strike.		